

HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

HP TUNERS, LLC, a Nevada limited liability
company,) CASE NO. 3:17-cv-05760-BHS
)
Plaintiff,) **PLAINTIFF’S RESPONSE IN**
) **OPPOSITION TO DEFENDANT JOHN**
vs.) **MARTINSON’S MOTION FOR LEAVE**
) **TO FILE SUPPLEMENTAL BRIEFING**
) **IN SUPPORT OF HIS MOTION FOR**
KEVIN SYKES-BONNETT and SYKED) **SUMMARY JUDGMENT**
ECU TUNING INCORPORATED, a)
Washington corporation, and JOHN)
MARTINSON,) **NOTING DATE: JUNE 5, 2020**

Defendants. **ORAL ARGUMENT REQUESTED**

Plaintiff HP TUNERS, LLC, a Nevada limited liability company (“HPT”), for its response in opposition to Defendant John Martinson’s Motion for Leave to File Supplemental Briefing in Support of his Motion for Summary Judgment (“Motion”) (Dkt. 183) states as follows:

INTRODUCTION

On July 31, 2019, Defendant John Martinson (“Martinson”) filed a motion for summary judgment (“Martinson MSJ”). The Martinson MSJ was fully briefed, including supplemental

1 briefs and evidence from both parties. (Dkt. 252, at 2). Martinson filed three (3) briefs
 2 supporting or supplementing his motion. (Dkt. 252, at 4 *citing* Dkts. 193, 211, 230).

3 On May 18, 2020, the Court issued its Order Denying Defendant's Motion for Summary
 4 Judgment ("MSJ Order") (Dkt. 252). In its MSJ Order, the Court denied the Martinson MSJ and
 5 in so doing discussed the legal standard and reasoning behind its decision. Two days later, on
 6 May 20, 2020, Defendant frantically filed the subject Motion requesting leave to file
 7 "supplemental briefing" on the already extensively briefed (and decided) Martinson MSJ. (Dkt.
 8 255). The Federal Rules of Civil Procedure and applicable case law provide the means,
 9 procedures, and guidance for post-order relief or reconsideration. *See, e.g.* Fed. R. Civ. P. 60(b).
 10 However, Defendant has yet again ignored procedural rules and case law entirely in this regard.
 11 Instead, Defendant Martinson has improperly commingled or conflated a request to retroactively
 12 file a supplemental brief on his Motion *post-ruling* with a purported request for reconsideration.
 13 As demonstrated herein, Defendant's Motion should be denied.
 14

15 ARGUMENT

16 **A. Legal Standard for Post-Order Relief or Reconsideration and Defendant's** 17 **Wholesale Disregard for the Governing Rules and Procedures.**

18 Defendant Martinson has essentially cast a motion for reconsideration as one for leave to
 19 file "supplemental briefing", which he contends is "neither improper or unusual ... where it is
 20 needed or helpful to enable a court to resolve a motion for summary judgment". (Dkt. 255, at 2).
 21 However, *supplemental briefing already occurred* relative to the Martinson MSJ and the motion
 22 was denied. (Dkts. 203, 211, 213, 225, 228, 230). The cases cited by Defendant in support of his
 23 motion are wholly distinguishable. Specifically, in each of these cases, the motions were on
 24 which supplemental briefing was requested were still pending and had not already been decided
 25

as is the posture here.¹ No case has been cited by Defendant in support of the proposition that a party can file supplemental briefs in connection with an already decided motion as the means by which he retroactively takes heed of the reasoning raised by the Court to support denial and seeks to remedy those deficiencies and failures in “supplemental” briefing.

Although Martinson claims that supplemental briefing will not be prejudicial (based on no timing/scheduling issues) and “will likely assist the Court” in arriving at Defendant’s desired result, these claims are self-serving as further briefing, time and expense associated with this motion is highly prejudicial to Plaintiff, would further delay trial of this matter and be futile in any event given the numerous factual issues that exist for the trier of fact to determine via-a-vis Martinson’s involvement, conduct and liability for the claims asserted (as demonstrated in the motion papers and supplemental briefing already filed and reviewed by this Court). Here, what Defendant clearly seeks is either reconsideration of, or relief from, the MSJ Order (which would be improper in any event).

Reconsideration of the MSJ Order would be inappropriate and has not been properly sought herein. A Motion to Reconsider is governed by Local Civil Rule 7(h), which explicitly states as its standard that:

Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.

See LCR 7(h)(1).

¹ Dkt. 255, at 2 citing *Becker v. McTarsney*, 2020 U.S. Dist. LEXIS 73672 (W.D. Wash. 2020) (Defendant’s Motion notes that this involved (“pending motions for summary judgment”); *Yaw v. Air & Liquid Systems Corporation*, 2019 U.S. Dist. LEXIS 67171 (W.D. Wash. 2019) (a *pro se* plaintiff filed a third and fourth motion for preliminary injunction – not summary judgment – and the Court merely reserved ruling on the issue of supplemental briefing); and *Silva v. Mayes*, 2005 U.S. Dist. LEXIS 33609 (W.D. Wash. 2005) (absent a pinpoint cite by Defendant Martinson, this decision seems to not even discuss supplemental briefing, let alone post-order).

1 Motions to reconsider are to be plainly labeled as such. *Contrast* LCR 7(h)(2) with
2 Motion (Dkt. 255). A Motion to Reconsider must point out with specificity the matters which
3 the movant believes were overlooked or misapprehended by the court, any new matters brought
4 to the court's attention for the first time, and the particular modifications being sought in the
5 court's prior ruling. *See* LCR 7(h)(1). Failure to comply may be grounds for denial of the
6 motion. *See* LCR 7(h)(2).

7 Defendant Martinson has sought to have the MSJ Order reconsidered but has
8 circumvented the correct procedure for doing so under the guise of seeking "leave to file
9 supplemental briefing". Nowhere in Defendant's Motion which seeks "leave to file a
10 supplemental brief" has he showed manifest error in the prior ruling or new facts or legal
11 authority which could not have been brought to the Court's attention earlier with reasonable
12 diligence. *Cf.* Motion (Dkt. 255). Simply put, Defendant has not raised *any* facts or arguments
13 which could not have been raised previously with reasonable diligence.

14 Likewise, Defendant is not entitled to relief from the MSJ Order under Federal Rule of
15 Civil Procedure 59 or 60. Rule 59 is inapplicable on its face, as it applies to new trials or
16 motions to amend or alter judgments. *See* Fed. R. Civ. P. 59(e). This Court, having denied
17 Martinson's MSJ, has never entered any judgment in this case.

18 As for Federal Rule of Civil Procedure 60, grounds exist whereby a party may seek to
19 obtain relief from a final judgment or from an order. *See* Fed. R. Civ. P. 60(b). Plaintiff
20 Martinson has no avenue to obtain relief pursuant to this rule since Martinson never references,
21 meets the standard(s), nor even articulates any of the bases which would permit the relief
22 afforded by the rule, which are: (1) mistake, inadvertence, surprise, or excusable neglect; (2)
23 newly discovered evidence that, with reasonable diligence, could not have been discovered in
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1 time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or
2 extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5)
3 the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that
4 has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other
5 reason that justifies relief. *Id.*

6
7 Regardless of how it has been cast or titled, Martinson's present Motion simply seeks
8 another bite at the apple which takes into account the comments of the Court after his MSJ and
9 three (3) prior briefs were adversely ruled upon. This District has addressed such an instance
10 where the Court may, and did, evaluate and rule upon a motion to reconsider denial of summary
11 judgment despite the movant not calling the motion what it actually was.

12 Specifically, in *Eckard v. Thomas*, 2019 U.S. Dist. LEXIS 215219 (W.D. Wash. 2019),
13 the Court found it beneficial to clarify the status of the movant's filings where a motion
14 requested that "the Court revisit its order ... denying Plaintiff's Motion for Summary Judgment."
15 *Eckard*, 2019 U.S. Dist. LEXIS at *1. Akin to Defendant Martinson, the *Eckard* movant did not
16 specifically reference any Federal Rule of Civil Procedure or otherwise identify an appropriate
17 legal basis for the motion. *Id.*, at *1-2. The Court significantly noted that the movant "would not
18 fare any better if the Court considered it as a motion for reconsideration" and that it did "not
19 warrant relief as a motion for reconsideration". *Id.*, at *4. In addressing its denial of the motion
20 as one for reconsideration, the Court cited to LCR 7(h) which disfavors reconsideration and that
21 such motions are "ordinarily den[ied] ... in the absence of a showing of new facts or legal
22 authority which could not have been brought to the Court's attention earlier with reasonable
23 diligence." *Eckard*, 2019 U.S. Dist. LEXIS at *4 quoting LCR 7(h)(1).
24
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1 For the reasons set forth above, the Court should deny Defendant's Motion for Leave to
 2 file a Supplemental Brief.

3 **B. Defendant's Attempted Substantive Factual Assertions are Improper, Misplaced**
 4 **and False**

5 Defendant has improperly made a series of substantive and factual arguments in support
 6 of his request for leave to file a supplemental brief but has ignored that the threshold issue of
 7 whether leave should be permitted has not been decided. These factual and legal arguments
 8 should be ignored, and leave should be denied for the reasons stated above.

9 As was the case during extensive briefing of the Martinson MSJ, Martinson yet again in
 10 "engages in fact-by-fact counter arguments explaining why HP Tuners's alleged facts are either
 11 incorrect or misrepresentations"² in the context of this motion for leave to file a supplemental
 12 brief. *See* Motion, at 3-10. Furthermore, although Martinson bears the burden of establishing
 13 that he is entitled to judgment as a matter of law which he "has completely failed to make"³, he
 14 repeatedly makes emphatic yet unsupported statements to artificially shift his own burden to HP
 15 Tuners' "failure of evidence", "absence of evidence", or "no evidence whatsoever". (Dkt. 255,
 16 at 3-10). In an astonishing display, the present Motion finds Martinson regurgitating his claim to
 17 summary judgment in the exact manner this Court already admonished.
 18

19 Finally, since this motion merely seeks leave to file a supplemental brief to further
 20 support the already failed Martinson MSJ, the substantive and factual arguments are premature
 21 and should not be considered in any event. In the event the Court grants leave to file
 22 supplemental briefs at this time (which it should not), HPT should be given an opportunity to file
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24 ² Dkt. 252, at 5 *citing* Dkt. 193, at 2-11.

25 ³ Dkt. 252, at 5.

1 a substantive response to the “supplemental brief” to address the purported factual and legal
2 arguments raised by Defendant.

3 **CONCLUSION**

4 For these reasons, Defendant John Martinson’s Motion for Leave to File Supplemental
5 Briefing in Support of his Motion for Summary Judgment should be denied.

6 WHEREFORE, HP TUNERS, LLC, respectfully prays for an order denying Defendant
7 John Martinson’s Motion for Leave to File Supplemental Briefing in Support of his (previously
8 denied) Motion for Summary Judgment and for such other and further relief as this Court deems
9 necessary and appropriate.

10 Dated this 1st day of June, 2020

11 Respectfully submitted,

12
13 s/ Andrew P. Bleiman
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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2020, I caused the foregoing to be electronically with the Clerk of Court using the **CM/ECF system** which will electronically send Notice to all Counsel of Record.

MARKS & KLEIN

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